IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1971

NO. _____

DON RHOADES CORPORATION,
a corporation, Petitioner,

vs.

AMERICAN INSTITUTE OF
MARKETING SYSTEMS, INC.,
a Missouri corporation, Respondent.

APPENDICES TO

RESPONDENT'S REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

Counsel for Respondent
SUTIN, THAYER & BROWNE
Irwin S. Moise and
Jonathan B. Sutin
800 Simms Bldg., P.O. Box 1945
Albuquerque, New Mexico 87103

NOTE

APPENDIX A

August 4, 1967

For value received, I/We promise to pay to the order of American Institute of Marketing Systems, Inc. or Bearer 6 consecutive equal monthly installments as follows, viz: $ 77.50 on the 20th day of August, 1967 and a like amount on the 20th day of each month thereafter until the entire sum is paid. If default is made in any installment when due under the terms of this note, the entire note shall become due and payable, together with reasonable attorney's fees, at the option of the payee. This note bears interest after maturity at the highest legal rate.

Where authorized, I/We authorize any attorney at law to appear in any court of record in the United States, after the above obligation becomes due and waive the issuing and service of process and confess a judgment against Me/Us in favor of the holder thereof for the amount then appearing due, and thereupon to release all errors and waive all right of appeal.

AIMS CORPORATION

DON RHOADES, CORPORATION

X _____

APPENDIX B

STATE OF NEW MEXICO COUNTY OF BERNALILLO

IN THE DISTRICT COURT

AMERICAN INSTITUTE OF MARKETING SYSTEMS, INC., a Missouri corporation,	)	
Plaintiff,	)	
vs.	)	No. A 38745
DON RHOADES CORPORATION, a corporation,	)	
Defendant.	)	

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

TO: HINES & MISTRETTA
Attorneys for Defendant
2929 Monte Vista, N.E.
Albuquerque, New Mexico

PLEASE TAKE NOTICE that on August 6, 1969, at 9:00 a.m., or as soon thereafter as counsel may be heard, the plaintiff will

move the Court for judgment on the ground that there exists in this action no genuine issue as to any material fact and the plaintiff is entitled to judgment as a matter of law.

This Motion is based on the Complaint filed herein and the affidavits and documents which are attached hereto as designated:

1. Affidavit of Newton D. Baker, attached hereto as Exhibit 1.

2. Affidavit of George M. Kinder, attached hereto as Exhibit 2.

3. Exemplified copy of Summons issued in the action, American Institute of Marketing Systems, Inc., vs. Don Rhoades Corporation, No. S-9369 (Magistrate Court, St. Louis County, Mo.), attached hereto as Exhibit 3.

4. Certified copy of return of service, exemplified, in the action, American Institute of Marketing Systems, Inc., vs. Don Rhoades Corporation, No. S-9369 (Magistrate Court,

St. Louis County, Mo.), attached hereto as Exhibit 4.

5. Certified copy of the Judgment, exemplified, in the action, American Institute of Marketing Systems, Inc., vs. Don Rhoades Corporation, No. S-9369 (Magistrate Court, St. Louis County, Mo.), attached hereto as Exhibit 5.

SUTIN, THAYER & BROWNE
Attorneys for Plaintiff

By s/Jonathan B. Sutin
Jonathan B. Sutin
P. O. Box 1945
Albuquerque,
New Mexico 87103

We hereby certify that we have mailed a copy of the foregoing Pleading to opposing counsel of record this 24th day of June, 1969.

SUTIN, THAYER & BROWNE

By s/Jonathan B. Sutin
Jonathan B. Sutin

[Page 14 of Respondent's Reply refers to Exhibit "A" to the foregoing Motion for Summary Judgment. The pertinent portions of the contract, the contract being attached as Exhibit "A" to the Affidavits of Baker and Kinder which were themselves attached to the Motion for Summary Judgment, are set out below:]

CONTRACT, paragraph 5(g) [automatic renewal provision]:

> g. The initial term of this agreement shall be 36 6 DER months commencing on the date the Agreement is accepted by AIMS at its home office, 111 So. So. Bemiston Avenue, St. Louis, Missouri 63105.

[The original of the above quoted pro-

vision shows the number "36" crossed out and the number "6" inserted above with the written initials "DER" which stands for "Donald E. Rhoades," the principal of the Petitioner.]

[Page 16 of Respondent's Reply refers to the foregoing Motion for Summary Judgment (Appendix B). The attachments to the Motion are not made a part of these appendices. The attachments are, however, listed on the Motion. Number 5, the certified copy of the Judgment, states that the action was an "Action for Contract."

RESPONDENTS

REPLY BRIEF

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1971

NO. _____

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Counsel for Respondent
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IN THE SUPREME COURT

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vs.

AMERICAN INSTITUTE OF
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a Missouri corporation, Respondent.

RESPONDENT'S REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

The Respondent requests the Court to deny the Petition for a Writ of Certiorari to the Supreme Court of the State of New Mexico on the following grounds:

A. THE NEW MEXICO SUPREME COURT HAS NOT DECIDED A FEDERAL QUESTION OF SUBSTANCE NOT HERETOFORE DETERMINED BY THE UNITED STATES SUPREME COURT

The Petition does not set forth a federal question of substance not before determined by the United States Supreme Court. United States Supreme Court Rule 19(1)(a). The United States Supreme Court has considered the question of collateral attack on foreign judgments based upon fraud. See STEWART v. MAXWELL, 1 N.M. 563 (1873), aff'd, 88 U.S. (21 Wall.) 71, 89 U.S. (22 Wall.) 77, 22 L.Ed. 565 (1875); CHRISTMAS v. RUSSELL, 72 U.S. (5 Wall.) 290, 18 L.Ed. 475 (1866). Cf., UNITED STATES v. THROCKMORTON, 98 U.S. (8 Otto) 61, 25 L.Ed. 93 (1878); HILTON v. GUYOT, 159 U.S. 113, 40 L.Ed. 95 (1895). The United States Supreme Court has considered

the validity of service of process under a contractual provision wherein a party to the contract appoints an agent in another state as his agent for service of process. NATIONAL EQUIPMENT RENTAL, LTD. v. SZUKHENT, 375 U.S. 311, 84 Sup. Ct. 411, 11 L.Ed. 2d 354 (1964).

B. THE PETITIONER HAS NOT COMPLIED WITH SUPREME COURT RULE 23(1)(f)

The Petitioner states that it raised fraud in the inducement as a defense in its Answer and on appeal, and that it raised a cognovit note defense on appeal (Petition, pp. 11, 12). The Petitioner failed, as required by Supreme Court Rule 23(1)(f), to:

a. State the way in which the questions were passed on by the Court;

b. Quote pertinent portions of the

record;

c. Specifically refer to the place in the record where these matters appeared.

C. THE COGNOVIT NOTE QUESTION, IF A FEDERAL QUESTION, WAS UNTIMELY AND NOT PROPERLY RAISED

As can be seen by negative inference from the Petition itself, the cognovit note question was neither a part of Petitioner's Answer to the Complaint, nor raised by the Petitioner at trial (Petition, p. 12). The New Mexico Supreme Court did not mention this question in its Opinion (Petition, Appendix "B", pp. 46-51). The cognovit note question, even if a federal question clearly raised in the Petition (see Part D, infra, regarding Supreme Court Rule 23(4)), was not timely and properly raised so as to give this Court jurisdiction to review the decision of the New Mexico Supreme Court on

writ of certiorari.

D. THE PETITIONER HAS NOT COMPLIED WITH SUPREME COURT RULE 23(4)

Under Supreme Court Rule 23(4), the Petitioner must "present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration." The Petition is neither accurate, brief, nor clear.

The Petitioner "shotguns" its quest for review by stating the question as (Petition, pp. 4-5):

> [W]hether the Court of a sister state is required to give full faith and credit to the judgment of the sister state under . . . (Article 4, Section 1, U.S. Constitution) blindly and without any defense being allowed the judgment debtor of the state where full faith and credit is sought to be invoked by the judgment entered in the sister state.

A look at the Petitioner's "Reasons

for Granting Writ" (Petition, pp. 13-16) shows that the Petition seeks relief under the umbrella of "due process of law." The reasons are general, oratorical statements with no specific application to the question presented. It appears that the Petitioner is contending that the Supreme Court of New Mexico has denied the Petitioner due process of law by not permitting the Petitioner to prevail on the specific defenses of (1) fraud in the inception or "conception" of the contract, and (2) judgment on a cognovit note. But precisely what the Petitioner is contending is unclear. The question should have been more accurately, briefly, and clearly presented.

E. THE CONTRACTUAL PROVISION REGARDING THE AGENT FOR SERVICE OF PROCESS IS VALID

The Petitioner refers to and quotes

paragraph 5(f) of the Respondent's contract (Petition, pp. 8-9). The Petitioner appears to contend that this provision is unlawful and that the New Mexico Supreme Court was blind to its illegality.

The Missouri Supreme Court, sitting en banc, has decided that the precise contractual provision in issue in this case, paragraph 5(f) of the Respondent's contract, is valid. STATE OF MISSOURI EX REL AMERICAN INSTITUTE OF MARKETING SYSTEMS, INC. v. CLOYD, 433 S.W. 2d 559 (Mo. Sup. Ct. 1968). The court held that service of process on an agent in Missouri appointed by a citizen of Arkansas under Section 5(f) of the AIMS contract was valid and binding.

The United States Supreme Court has upheld a similar provision. NATIONAL EQUIPMENT RENTAL, LTD. v. SZUKHENT, 375 U.S. 311,

84 Sup. Ct. 411, 11 L.Ed. 2d 354 (1964).

F. THE JUDGMENT OF A SISTER STATE CANNOT BE COLLATERALLY ATTACKED BASED ON A DEFENSE OF INTRINSIC FRAUD

The Petitioner admits that its attack on the Missouri judgment was based upon the defense of fraud in the inducement to enter the contract (Petition, pp. 11-12, 15). Only one of the three cases cited by the Petitioner in support of its position denied full faith and credit to a judgment of a sister state, viz., LEVIN v. GLADSTEIN, 142 N.C. 482, 55 S.E. 371, 32 L.R.A.N.S. 905, 115 Am. St. Rep. 747 (1906). LEVIN, however, is in point against the Petitioner, for it made it clear that full faith and credit will be denied a judgment only if the fraud went to the procurement of the judgment (extrinsic fraud), and not if it

went to the inducement of a contract (intrinsic fraud). Indeed, the Petition, p. 20, states this to be the law.

A reading of the two other cases cited by the Petitioner (Petition, p. 19), MAY v. ANDERSON, 345 U.S. 528, 73 Sup. Ct. 840, 97 L.Ed. 1221 (1953), and MILWAUKEE COUNTY v. M. E. WHITE CO., 296 U.S. 268, 56 Sup. Ct. 229, 80 L.Ed. 220 (1935) shows that neither case supports the Petitioner's position.

The law is clear that in an action on a foreign judgment, fraud in the inducement, or intrinsic fraud, is not available as a defense. REIS v. TRAVELERS INDEMNITY CO., 366 S.W. 2d 11, 13 (Mo. 1963); VENEGONI v. GIUDICY, 238 S.W. 2d 17 (Mo. App. 1951); PICADURA v. HUMPHREY, 335 S.W. 2d 6 (Mo. Sup. Ct. 1960); GIBSON v. EPPS, 352 S.W. 2d 45 (Mo. App. 1961).

It is Hornbook law that valid, final and subsisting judgments of a sister state are entitled to full faith and credit under Article IV, Section 1 of the United States Constitution, when sued upon in another state. HOUSTON FIRE AND CASUALTY INS. CO. v. FALLS, 67 N.M. 189, 354 P.2d 127 (1960); MOUNTAIN STATES FIXTURES CO. v. DASKALOS, 61 N.M. 491, 303 P.2d 698 (1956); ALBRIGHT v. ALBRIGHT, 45 N.M. 302, 115 P.2d 59 (1941); EVENS v. KELLER, 35 N.M. 659, 6 P.2d 200 (1932); STEWART v. MAXWELL, 1 N.M. 563, aff'd, 88 U.S. (21 Wall.) 71, 22 L.Ed. 564, on petition for rehearing 89 U.S. (22 Wall.) 77, 22 L.Ed. 565 (1875); SCOTT v. SCOTT, 441 S.W. 2d 330 (Mo. Sup. Ct. 1969); GIBSON v. EPPS, 352 S.W. 2d 45 (Mo. App. 1961); 50 C.J.S., Judgments, §§ 888(b), 889 (1947); 47 Am. Jur. 2d, Judgments, §§ 1218, 1224

(1969).

In STEWART v. MAXWELL, 88 U.S. (21 Wall.) 71, 22 L.Ed. 564 (1875), an action of debt was commenced in the district court of New Mexico upon a judgment in one of the courts of record of Kansas. One of the defenses was that the judgment sued upon was obtained by false and fraudulent assertion of a contract, and by means of false and interested testimony. The court said, 88 U.S. at 73:

> In Christmas v. Russell, 5 Wall, 304 [72 U.S. XVIII, 479], this court held that fraud could not be pleaded to an action in one state upon a judgment in another. With this we are satisfied.
>
> Since the case of Mills v. Duryee, 7 Cranch, 481, it has been settled in this court that nil debet is not a good plea to an action upon a judgment in another state.

EL CAPITAN LAND & CATTLE CO. v. LEES,

13 N.M. 407, 86 P. 924 (1906), was a suit in New Mexico on a Kansas judgment. Defendant contended that fraud, consisting of false and perjured testimony, fraudulent concealment and collusion may be set up as a defense to the foreign judgment. The trial court did not accept this defense and rendered judgment for the plaintiff, and defendant appealed. The New Mexico Supreme Court affirmed the judgment and said, 86 Pac. at 926:

> Bearing in mind the law as declared by the authorities above cited, it is clear that the fraud alleged in the answer is not such fraud as would constitute an available defense to the judgment sued on. If Hockett's testimony was false, even to the extent of perjury, it is evident that it was concerning a matter either actually tried or which might have been tried in the action in the Kansas court. In fact, it appears that the judgment was rendered upon the testimony given by Hockett as to the correct-

ness of the account, which is alleged to have been false, and, hence, the fraud alleged related to an issue actually tried.

See Annot. 55 A.L.R. 2d 673, Fraud as Defense to Action on Judgment of Sister State, and supplements. EL CAPITAN, supra, and STEWART v. MAXWELL, supra, are cited on p. 702.

There is no defense, nor evidence of any defense that Rhoades Corporation intended to contest the Missouri claim but did not do so because of any conduct of AIMS.

G. THE MISSOURI JUDGMENT CANNOT BE COLLATERALLY ATTACKED BASED ON A DEFENSE THAT THE JUDGMENT WAS BASED ON A COGNOVIT NOTE

The Petitioner appears also to contend that it was denied due process of law because the Missouri judgment was based on a cognovit note and the New Mexico Supreme Court refused to allow the Petitioner's

defense in that regard. The Petitioner's claims are baseless:

First, the Petitioner did not raise this issue in the trial court. Further, the trial court made no Finding of Fact or Conclusion of Law that the Missouri judgment was based upon a cognovit note.

Second, the Missouri judgment was based upon the automatic renewal provision (5)(g) of the contract (Opinion of New Mexico Supreme Court, Petition, Appendix B, p. 48; see Exhibit "A" to Motion for Summary Judgment, Appendix "B", infra). The note (Appendix "A", infra) and the contract (Exhibit "A" to Motion for Summary Judgment, Appendix "B", infra) were for an original term of six months; the Petitioner paid for the first six months; the Petitioner signed no new note, but rather its

liability arose from the automatic renewal provision.

Third, even if the judgment were based on the cognovit note, it would not be invalid and would still be entitled to full faith and credit. MOUNTAIN STATES FIXTURES v. DASKALOS, 61 N.M. 491, 303 P.2d 698 (1956).

Fourth, even assuming that the law in New Mexico were not stated in MOUNTAIN STATES FIXTURES v. DASKALOS, supra, the state of forum cannot defeat a foreign judgment because it was based on a cause of action which the forum itself would not have recognized. UNION NAT'L BANK v. LAMB, 337 U.S. 38, 69 Sup. Ct. 911, 93 L.Ed. 1190 (1949).

H. THE NEW MEXICO SUPREME COURT HELD THAT THE TRIAL COURT SHOULD HAVE GRANTED SUMMARY JUDGMENT

At the summary judgment stage of the proceedings the Petitioner did not support its fraud defenses.

The Respondent filed a Motion for Summary Judgment (Appendix "B", infra) in the trial court. The Petitioner filed no counter-affidavit or other document to rebut the facts stated in the Respondent's Motion for Summary Judgment. The trial court denied the Respondent's Motion, although the only facts properly before the court were those contained in the Respondent's Motion for Summary Judgment.

The Respondent's first point on appeal to the New Mexico Supreme Court was as follows:

> The trial court should have sustained Plaintiff's Motion for Summary Judgment because the Missouri judgment was entitled to full faith and credit in

New Mexico as a matter of law, and because there was no genuine issue as to any material fact.

The New Mexico Supreme Court held (Petition, p. 50) that the trial court should have granted summary judgment.

The New Mexico Supreme Court had every reason to reverse the trial court. The Respondent's Motion for Summary Judgment contained uncontradicted facts sufficient to support a judgment as a matter of law. The Petitioner not only failed to raise his defenses in the Missouri trial court, he also failed to raise and support them with facts in response to the Respondent's Motion for Summary Judgment.

In New Mexico, where the facts are clear and undisputed and the only issue is the construction of documents as written, summary judgment is proper. HARRIS v. FOUR

HILLS DEVELOPMENT CORP., 79 N.M. 370, 443 P.2d 863 (1968). Where there was no issue of fact as to proper service of process on a California judgment, summary judgment was proper. SHUMATE v. HILLIS, 80 N.M. 308, 454 P.2d 965 (1969).

The validity and finality of a foreign judgment are to be tested by the law of the jurisdiction where the judgment was rendered. BAKER v. ERBERT, 199 Kan. 59, 427 P.2d 461 (1967); LIEBENDORFER v. GAYLE, 217 So. 2d 37 (La. App. 1968); LINCOLN SAFE DEPOSIT CO. v. CONTINENTAL LIFE INS. CO., 213 Mo. App. 561, 249 S.W. 677 (1923). A reading of the Missouri statutes and cases makes it clear that the Missouri judgment was valid and entitled to full faith and credit in New Mexico. See Mo. Ann. Stat. §§ 482.090 (Supp. 1970), 506.150(3) (1952), 517.050

(Supp. 1970), 517.080 (Supp. 1970), 517.100 (Supp. 1970), 517.110 (Supp. 1970), 517.770 (Supp. 1970); WILLIAMSON v. WILLIAMSON, 331 S.W. 2d 140 (Mo. App. 1960); STATE OF MISSOURI EX REL AMERICAN INSTITUTE OF MARKETING SYSTEMS, INC. v. CLOYD, 433 S.W. 2d 559 (Mo. Sup. Ct. 1968).

That full faith and credit is to be given to properly attested judicial proceedings is clear. U.S. Constitution, Article IV, Section 1; 28 U.S.C.A. § 1738.

C O N C L U S I O N

The higest court of the State of New Mexico has considered each issue raised herein by the Petitioner, and has properly given full faith and credit to the Missouri judgment. For the reasons stated in this Reply, the Respondent requests this Court

to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

Counsel for Respondent
SUTIN, THAYER & BROWNE
Irwin S. Moise and
Jonathan B. Sutin
800 Simms Building
P. O. Box 1945
Albuquerque, New Mexico

Dated this 1st day
of September, 1971.